WRP ASIA PACIFIC SDN BHD A

v.

TENAGA NASIONAL BHD

FEDERAL COURT, PUTRAJAYA B
ARIFIN ZAKARIA CJ
RAUS SHARIF PCA
SURIYADI HALIM OMAR FCJ
[CIVIL APPEALS NO: 02 (f)-4-2011(W) & 02 (f)-3-2011(W)]
12 DECEMBER 2011 C

ADMINISTRATIVE LAW: *Judicial review - Remedies - Certiorari - Allegation of - Electricity meter at appellant's premises found to be tampered - Decision of respondent to disconnect electricity supply and to demand amount claimed - Powers of respondent - Electricity Supply Act 1990, s. 38 - Whether respondent's decision can be challenged - Relationship between parties - Breach of - Whether contractual relationship of parties regulated by private law - Whether judicial review a public law remedy - Whether facts and circumstances amenable to judicial review - Rules of the High Court 1980, O. 53* D E

ADMINISTRATIVE LAW: *Remedies - Judicial Review - Applicability of - Whether an entity can be subject to judicial review when its activities are subject to supervision according to rules and principles of public law - Whether decision made by public authority amenable to judicial review - Rules of the High Court 1980, O. 53* F

PUBLIC UTILITIES: *Electricity - Notice to disconnect electricity supply - Allegation of - Application by way of judicial review - Electricity meter at appellant's premises found to be tampered - Decision of respondent to disconnect electricity supply and to demand amount claimed - Powers of respondent - Electricity Supply Act 1990, s. 38 - Whether respondent's decision can be challenged - Relationship between parties - Breach of - Whether contractual relationship of parties regulated by private law - Whether judicial review a public law remedy - Whether facts and circumstances amenable to judicial review - Rules of the High Court 1980, O. 53* G H

The appellant was a company which operated factories and manufactured, amongst others, disposable latex and synthetic gloves. *Vide* letter dated 22 January 2010 ('the letter'), in which I were enclosed a Form A notice dated 22 January 2010 and a bill

('the two documents'), all issued pursuant to s. 38 of the Electricity Supply Act 1990 ('the Act'), the respondent notified the appellant that as a result of the meter inspection carried out at the factory premises, it was discovered that the meter located there was found to be tampered. The said tampering had resulted in inaccurate reading of the electricity consumption whereby the appellant was undercharged up to RM5,485,463.87. Through the letter, the appellant was then instructed to pay the amount claimed within 14 days failing which the electricity supply would be disconnected. Being dissatisfied with the decision in the letter and the two documents, the appellant filed an application for judicial review under O. 53 of the Rules of the High Court 1980 ('RHC'), to include amongst others, the order of *certiorari* to declare that the respondent's decision was ineffectual in law. The High Court dismissed the appellant's application for leave whereby it was held that under s. 38(1) of the Act, once it was discovered that there was evidence of meter tampering, the respondent was empowered to disconnect the electricity supplied, subject to the issuance of a notice. Further, the High Court held that it was not open to the appellant to challenge the power given to the respondent under the Act to disconnect electricity supply and to demand the amount claimed. The appellant's appeal was also dismissed by the Court of Appeal where it was held that since the relationship between the appellant and the respondent came within an environment regulated by private law, it was not open for the appellant to challenge the respondent's decision by way of judicial review, which was a public law remedy. Hence this appeal by the appellant. Leave to appeal was granted by this court and the issue that arose for consideration was whether judicial review would lie against the respondent to challenge the exercise of its power conferred pursuant to s. 38 of the Act.

Held (dismissing the appeal with costs)
Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

(1) An application for judicial review is a procedure by which an aggrieved person may seek to review a public authority's decision, with judicial review referring to the power to supervise the activities, inclusive of the latter's decision. Express statutory power is vested in the High Court by the Courts of Judicature Act 1964, the Specific Relief Act 1950 and the RHC to deal with this supervisory power. Whether

an entity is subject to judicial review depends on whether its activities are subject to supervision according to the rules and principles of public law. (para 9)

(2) The person entitled to make an application for judicial review has to be any person who is adversely affected by the decision. On the facts herein, any discontinuance of the electricity supply would cause untold grief to the appellant's business. A possibility of a prosecution being taken under s. 37(3) of the Act could not be discounted either. Hence, the appellant was not a mere busybody but a person that would be adversely affected by the decision of the respondent. Further, the appellant's application for judicial review was made within the 40 days period required by O. 53 r. 3(6) of the RHC (*Yahya Kassim v. Kerajaan Malaysia & Anor*; refd). (paras 15 & 17)

(3) By virtue of O. 53 RHC, only a decision made by a public authority is amenable to judicial review. The respondent, which was corporatised under a privatisation scheme, was owned by many different persons including the government and had acted like any limited company under the Companies Act 1965. The facts herein came within a commercial or contractual environment whereby the respondent had established a private relationship with the appellant when they mutually signed a contract of supply. This relationship was commerce-based, with the appellant being the consumer and the respondent as the energy supplier company. (paras 18, 20 & 21)

(4) The respondent would have expected the appellant to keep its part of the bargain by not tampering with the electricity meter that would cause losses to it. Further, the letter and the two documents were sent out due to the wrongful tampering of the electricity meter on account of a breach of private law (*Queen v. Minister of Enery and Director General of Electricity Supply ex parte Robert Guildford*; refd). (paras 20 & 22)

(5) This appeal was unlike the case of *Tenaga Nasional Bhd v. Ong See Teong & Anor*, where the appellant therein had, in exercise of its responsibility to the public pursuant to s. 13 of the Act, was freed of private law when it could enter any land to undertake whatever was necessary for the purpose of maintaining, repairing or upgrading any licensed installation or

A any part thereof. There was no relationship which existed between the said appellant, which was carrying out a public function under the Act, and the land owners. (para 23)

(6) Section 38 of the Act empowers the respondent to B discontinue electricity supply based on the subjective finding of its employee if any offence has been found committed under ss. 37(1), 37(3) or 37(14) of the Act. The respondent had clearly complied with all the necessary statutory requirements where it had served the appellant not only with the letter but C also the two documents, which were necessary pre-requisites under the Act. In the event if the respondent was later found to have breached its obligation under the contract or its statutory obligation, the appellant may file an action against the respondent. Hence, the appellant was not without a D remedy. (para 25)

(7) Though the appellant had successfully established the issue of *locus standi* and the time factor, it failed to establish that the impugned matter fell under the public law realm. Despite the earlier error committed by the respondent when it E disconnected the electricity supply for eight hours, the court was convinced that the basis of the appellant's appeal fell outside the ambit of judicial review. (para 26)

Bahasa Malaysia *Translation Of Headnotes*

F

Perayu merupakan sebuah syarikat perkilangan dan menghasilkan, di antara lain, lateks pakai buang dan sarung tangan sintetik. Melalui surat bertarikh 22 Januari 2010 ('surat'), yang dilampirkan bersama-sama dengan notis Borang A bertarikh 22 Januari 2010 G dan satu bil ('dua dokumen tersebut'), kesemuanya dikeluarkan menurut s. 38 Akta Bekalan Elektrik 1990 ('Akta'), responden telah memaklumkan perayu bahawa berdasarkan pemeriksaan meter yang dijalani di premis kilang itu, ianya telah didapati bahawa meter yang ditempatkan di sana telah diusik. Usikan tersebut telah H menyebabkan ketidaktepatan bacaan penggunaan elektrik di mana perayu telah dikurangcaj sehingga RM5,485,463.87. Melalui surat itu, perayu telah diarahkan untuk membayar jumlah yang dituntut dalam masa 14 hari, dan jika gagal bekalan elektrik akan dipotong. Tidak puas hati dengan keputusan di dalam surat dan dua I dokumen tersebut, perayu telah memfailkan permohonan untuk semakan kehakiman di bawah A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), antara lain, untuk perintah *certiorari* bagi

mengisytihar bahawa keputusan responden adalah tidak sah di bawah undang-undang. Mahkamah Tinggi telah menolak permohonan perayu untuk kebenaran dimana ianya diputuskan bahawa di bawah s. 38(1) Akta, apabila terdapatnya bukti pengusikan meter, responden mempunyai kuasa untuk memotong bekalan elektrik, tertakluk kepada pengeluaran notis. Tambahan, Mahkamah Tinggi memutuskan bahawa ianya tidak terbuka kepada perayu untuk mencabar kuasa yang diberi kepada responden di bawah Akta untuk memotong bekalan elektrik dan menuntut amaun yang dituntut. Rayuan perayu juga ditolak oleh Mahkamah Rayuan dimana ianya diputuskan bahawa memandangkan perhubungan di antara perayu dan responden jatuh di bawah persekitaran yang dikawal oleh undang-undang persendirian, ianya tidak terbuka kepada perayu untuk mencabar keputusan responden melalui semakan kehakiman yang merupakan suatu remedi undang-undang awam. Oleh itu rayuan ini oleh perayu. Kebenaran merayu telah dibenarkan oleh mahkamah ini dan isu yang timbul untuk pertimbangan adalah sama ada tindakan semakan kehakiman boleh diambil terhadap responden untuk mencabar pelaksanaan kuasanya yang disediakan di bawah s. 38 Akta.

Diputuskan (menolak rayuan dengan kos)
Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

(1) Permohonan untuk semakan kehakiman adalah suatu prosedur di mana seseorang yang terkilan boleh menyemak keputusan pihak berkuasa awam, dengan semakan kehakiman merujuk kepada kuasa untuk mengawas aktiviti-aktiviti, termasuk keputusan pihak berkuasa awam. Kuasa ekspres statutori ini dikurniakan kepada Mahkamah Tinggi oleh Akta Mahkamah Kehakiman 1964, Akta Relif Spesifik 1950 dan KMT untuk mengendalikan kuasa pengawasan ini. Sama ada sesuatu entiti tertakluk kepada semakan kehakiman bergantung kepada sama ada aktiviti-aktivitinya tertakluk kepada peraturan dan prinsip undang-undang awam.

(2) Pihak yang layak untuk membuat permohonan semakan kehakiman adalah seseorang yang kepentingannya terjejas oleh keputusan itu. Berdasarkan fakta di sini, sebarang pemotongan bekalan elektrik akan menyebabkan kesusahan kepada perniagaan perayu. Kemungkinan suatu pendakwaan diambil di bawah s. 37(3) Akta juga tidak boleh diabaikan. Oleh itu, perayu bukanlah penyibuk tetapi seorang yang kepentingannya

A boleh terjejas oleh keputusan responden. Lagipun, permohonan perayu untuk semakan kehakiman telah dibuat dalam masa 40 hari seperti yang diperuntukkan oleh A. 53 k. 3(6) KMT (*Yahya Kassim v. Kerajaan Malaysia & Anor*; dirujuk).

B **(3)** Di bawah A. 53 KMT, hanya keputusan yang dibuat oleh pihak berkuasa awam boleh tertakluk kepada semakan kehakiman. Responden yang telah diswastakan di bawah skima penswastaan, telah dimiliki oleh pelbagai badan termasuk kerajaan dan telah bertindak sebagai mana-mana syarikat C berhad di bawah Akta Syarikat 1965. Fakta di sini terbit daripada persekitaran komersil atau kontraktual di mana responden telah mewujudkan satu perhubungan peribadi dengan perayu apabila mereka telah menandatangani kontrak pembekalan. Perhubungan ini adalah berasaskan perdagangan, D di mana perayu adalah pengguna dan responden merupakan syarikat pembekal tenaga.

(4) Responden mengharapkan bahawa perayu akan mengotakan janjinya untuk tidak mengusik meter elektrik yang akan menyebabkan kerugian terhadapnya. Apapun, surat dan kedua- E dua dokumen tersebut telah dihantar kerana terdapat pengusikan salah meter elektrik berdasarkan pelanggaran undang-undang persendirian (*Queen v. Minister of Enery and Director General of Electricity Supply ex parte Robert Guildford*; dirujuk).

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(5) Rayuan ini tidak sama seperti kes *Tenaga Nasional Bhd v. Ong See Teong & Anor*, di mana perayu di sana telah, dalam pelaksanaan tanggungjawabnya terhadap orang awam berdasarkan s. 13 Akta, terlepas daripada undang-undang G persendirian apabila ianya telah memasuki mana-mana tanah untuk mengambil apa-apa yang diperlukan bagi tujuan menjaga, membaikpulih atau menaiktaraf sebarang pemasangan berlesen atau mana-mana bahagiannya. Tiada perhubungan yang wujud di antara perayu di situ, yang hanya menjalankan suatu fungsi H awam di bawah Akta, dengan pemilik-pemilik tanah.

(6) Seksyen 38 Akta memberi kuasa kepada responden untuk memberhentikan bekalan elektrik berdasarkan pendapat subjektif pekerja-pekerjanya jika sesuatu kesalahan telah I didapati dilakukan di bawah ss. 37(1), 37(3) or 37(14) Akta. Responden telah dengan jelas mematuhi segala kehendak statutori yang diperlukan di mana ianya telah menyampaikan

kepada perayu bukan sahaja surat itu tetapi juga kedua-dua dokumen tersebut, yang merupakan prasyarat di bawah Akta. Dalam sebarang keadaan, jika responden didapati telah memungkiri obligasinya di bawah kontrak atau pun obligasi statutorinya, perayu boleh memfailkan tindakan terhadap responden. Oleh itu, perayu bukannya tidak mempunyai apa-apa remedi.

(7) Walau pun perayu telah berjaya membuktikan isu *locus standi* dan faktor masa, ianya telah gagal membuktikan bahawa perkara ini jatuh di bawah lengkongan undang-undang awam. Walaupun berlaku kesalahan terdahulu responden apabila memberhentikan bekalan elektrik selama lapan jam, mahkamah berpuas hati bahawa rayuan perayu berada diluar lingkungan semakan kehakiman.

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Chief Constable of North Wales Police v. Evans [1982] 3 All ER 141 ***(refd)***

Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd [2006] 4 CLJ 892 CA ***(refd)***

IRC v. National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 ***(refd)***

Mohd Nordin Johan v. The Attorney-General, Malaysia [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 FC ***(refd)***

Queen v. Minister of Energy and Director General of Electricity Supply ex parte Robert Guildford [1998] EWHC Admin 203 ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

Tenaga Nasional Bhd v. Ong See Teong & Anor [2010] 2 CLJ 1 FC ***(dist)***

Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd [2002] 3 CLJ 624 CA ***(refd)***

Yahya Kassim v. Kerajaan Malaysia & Anor [1998] 1 CLJ 43 CA ***(refd)***

Legislation referred to:

Electricity Supply Act 1990, ss. 13, 37(1), (3), (14), 38(1)

Rules of the High Court 1980, O. 53 rr. 2(4), 3(6)

Other source(s) referred to:

MP Jain, *Administrative Law of Malaysia and Singapore,* 2nd edn, p 462

A *For the appellant - Robert Low (CL Tan & Ahmad Shahrizal with him); M/s Ranjit Ooi & Robert Low*
For the Attorney General's Chambers - Shamsul Bolhassan (Nadia Hanim Tajuddin with him) FCs
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B

[Editor's note: For the Court of Appeal judgment, please see WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd & Another Appeal [2011] 4 CLJ 838.]

Reported by Kumitha Abd Majid

C

JUDGMENT

Suriyadi Halim Omar FCJ:

D **[1]** Leave was applied for at the High Court by the appellant pursuant to O. 53 r. 3 of the Rules of the High Court 1980 (the Rules), for a judicial review of a decision made by Tenaga Nasional Berhad (the respondent), a decision which aggrieved the appellant. The High Court dismissed the leave application. The appellant E then filed the relevant appeal to the Court of Appeal but was dismissed too.

[2] Being dissatisfied, the appellant forthwith applied for leave to appeal to the Federal Court, with the question for determination F being:

> Whether judicial review lies against Tenaga Nasional Berhad to challenge the exercise of its power conferred pursuant to section 38 of the Electricity Supply Act, 1990 (read together with other relevant sections of the Electricity Supply Act, 1990 thereto and/ G or applicable regulations pursuant to the Licensee Supply Regulations 1990 thereto)?

[3] The appellant was successful in its application and leave to appeal was granted. We subsequently heard the appeal proper and H today is for decision of the appeal.

Background Facts

[4] The appellant runs and operates factories, and manufactures amongst others, disposable latex and synthetic gloves. On I information received, the respondent on 14 November 2009 raided

the appellant's factory premises, and there found the electricity meter having been tampered with, causing it to fail to record the correct usage of electricity. The respondent then discontinued the electricity but reconnected it some eight hours later.

[5] *Vide* a letter dated 22 January 2010, in which were enclosed a Form A notice dated 22 January 2010 and a bill carrying number 2197471 ("the two documents"), all issued pursuant to s. 38 of the Electricity Supply Act 1990 (the Act), the respondent notified the appellant that as a result of a meter inspection carried out on 14 November 2009 at the factory premises, it was discovered that the meter located there was found tampered with. The Form A notice was issued in relation to the commission of an offence under s. 37(3) of the Act. This tampering had resulted in inaccurate reading of the electricity consumption thus undercharging up to RM5,485,463.87. The bill details out the amount. Through the letter the appellant was then instructed to pay that amount within 14 days, failing which the electricity supply would be disconnected on 5 February 2010.

[6] It was due to the dissatisfaction of the decision in 22 January 2010 letter and the two documents that the appellant filed the application for a judicial review under O. 53 of the Rules. But the appellant had to circumvent the first hurdle ie, the leave stage. It failed. The High Court when dismissing the appellant's application for leave held, *inter alia*, that there was no element of discretion in the issuance of the notice under s. 38(1) of the Act. Under it, once it was discovered that there was evidence of meter tampering, the respondent was empowered to disconnect electricity supplied, subject to the issuance of a notice. The High Court too opined that s. 38(1) of the Act was drafted to specifically safeguard the interest of the respondent and allow it to take immediate action to prevent misuse of electricity. It was not open to the appellant to challenge the power given to the respondent under the Act to disconnect electricity supply and to demand the amount claimed.

[7] At the Court of Appeal the appellant's appeal was dismissed on the ground that the relationship between the appellant and the respondent was purely commercial or contractual. As the relationship came within an environment regulated by private law it was not open to the appellant to challenge the respondent's decision by judicial review, which was a public law remedy. In

dismissing the appellant's appeal, the Court of Appeal relied on *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd* [2006] 4 CLJ 892. This case relates to an Erinford injunction application to prevent the TNB from disconnecting the supply of electricity to the plaintiff's premises. Zulkefli Ahmad Makinudin JCA (as he was then) when dismissing the appeal remarked:

> TNB's s. 38 notice to disconnect the electricity supply for offences enumerated in s. 37 need not prove the offences in court. The reason is that, any purported act to review such act will defeat the swift enforcement under the Act where electricity supply needs to be severed immediately to avoid further illegal usage by the perpetrator. The nature of the act taken by TNB arose from a commercial obligation on the part of the consumer rather than TNB's obligation under public law.

[8] Zulkefli Ahmad Makinudin JCA also elaborated that s. 38(1) of the Act was enacted to give effective powers to TNB to instantly prevent any offence that may be committed and not to be left unattended or unabated. It provided specifically for the preservation of TNB's interest and empowers TNB to act expeditiously, thereby preventing misuse such as theft of electricity supplied by TNB.

Reasons For Our Decision

[9] An application for judicial review is a particular procedure by which an aggrieved person can seek to review a public authority's decision, with judicial review referring to the power to supervise the activities, inclusive of the latter decision. Express statutory power is vested in the High Court by the Courts of Judicature Act 1964, the Specific Relief Act 1950 and the Rules of the High Court 1980 to deal with this supervisory power. The basis of the application will be based on principles of public law. In a nutshell, and which is relevant to the question for determination, whether an entity is subject to judicial review depends very much on whether its activities are subject to supervision according to rules and principles of public law.

[10] Here, being dissatisfied with the decision of the respondent, the appellant filed the judicial review application, to include amongst others the order of *certiorari* (the others being for a declaration, prohibition order and an injunction). As fundamentally judicial review relates to the issue of jurisdiction, the appellant

desires to establish that the respondent had acted without authority, thus rendering the decision as contained in the letter to be void. A court order of *certiorari* will formally declare that decision to be ineffectual in law.

[11] This application was filed despite the respondent not being a public authority. How then can the appellant succeed? By analogy M.P Jain had occasion to author in *Administrative Law of Malaysia and Singapore* (2nd edn) at p. 462, "*certiorari* is issued not only to a statutory body but even to a non-statutory body which is under a duty to act judicially and performing a public duty."

[12] For purposes of its application, the appellant had alluded to the statutory route of O. 53 of the Rules. Under this order two stages are anticipated, with the leave stage being the first, to be followed closely by the substantive hearing after successfully obtaining leave at the High Court. At the leave stage, on a quick perusal of the material available, if the court thinks that subsequently at the substantive hearing stage an arguable case may be disclosed, and the relief sought may be granted, leave should be granted (*IRC v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617). In Malaysia, the Federal Court in *Mohd Nordin Johan v. The Attorney-General, Malaysia* [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 when allowing the appeal, opined that 'the point taken was not frivolous to merit refusal of leave *in limine* and justified argument on a substantive motion for *certiorari*'. Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[13] Returning to the mainstream, the appeal before us relates to the first stage ie, the leave application. With both the High Court and the Court of Appeal having rejected the leave application, we now begin by resolving certain preliminary matters, namely whether the appellant has the necessary *locus standi*, whether it has complied with the time factor, and whether the facts and circumstances before us are amenable to judicial review.

[14] For purposes of deciding whether the appellant has the *locus standi* to file the judicial review application O. 53 r. 2(4) of the Rules is relevant. It reads:

> Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[15] Appreciating the above provision, the person entitled to make the application has to be any person who is adversely affected by the decision. As the facts are quite straightforward, no serious judicial activism is required here. The appellant claimed that it was directly and adversely affected by the decision of the respondent. Apart from the matter of the huge sum of RM5,485,463.87 which was required to be paid, there was also the threat hanging over its head like the Sword of Democles, in the event there was failure to comply with the letter. Any discontinuance of the electricity supply would cause untold grief to the business of the appellant. A possibility of a prosecution being undertaken under s. 37(3) of the Act could not be discounted either. Having considered the appellant's submission we are satisfied that it is not a mere busybody but a person that will be adversely affected by the decision of the respondent.

[16] We now touch on the legal requirement of whether the application was made on time. For this purpose, O. 53 r. 3(6) of the Rules is relevant, and it reads:

> An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

[17] To regurgitate the facts, the respondent's decision was communicated to the appellant *vide* a letter dated 22 January 2010, and attached to it are the two documents. The appellant's application was made on 3 February 2010. In short this application was made within the 40 days period as required by the Rules and hence within time (*Yahya Kassim v. Kerajaan Malaysia & Anor* [1998]) 1 CLJ 43).

[18] With the basic requirements satisfied, the all important question to be confronted, and which will forthwith resolve the question for determination, is the legal interpretation of whether

the respondent is excluded from any judicial review due to the restrictions of O. 53 of the Rules. This provision legislates that only a decision made by a public authority is amenable to judicial review. It is common ground that the respondent is a corporate body but provides public functions regulated by the Act. So, does judicial review lie against the respondent for the decision as reflected in the letter dated 22 January 2010 and the two documents though not a public authority? The answer depends very much on whether the action of the respondent falls within the public law environment (*Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd* [2002] 3 CLJ 624 p. 635). To quote Gopal Sri Ram JCA when discussing whether TNB was amenable to judicial review:

> So what answer is to be given to the question: does judicial review lie against the appellant? In our view, the answer lies in two words. It depends.
>
> If the activity of the appellant in the private law sphere is called into question, eg the wrongful allotment or issuance of shares, the alleged wrongful removal of a director and the like, then, plainly judicial review will not lie. On the other hand, if the activity complained of falls within the public law environment, then of course judicial review will be available.

[19] It is admitted that the respondent's decision in issuing the letter dated 22 January 2010, and the two documents were exercised pursuant to a power conferred by the Act particularly s. 38. In truth when the respondent issued the letter and the two documents, it was then exercising a power of an authoritative body, though we must with haste clarify that not every decision of such body is suitable for judicial review (*Tenaga Nasional Bhd v. Ong See Teong & Anor* [2010] 2 CLJ 1). In *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865, James Foong FCJ had occasion to state:

> ... It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. To qualify there must be sufficient public law element in the decision made.

[20] The respondent, which was corporatised under a privatisation scheme, is owned by many different persons including the government and has acted like any limited company under the Companies Act 1965 in the circumstances of the case (*Tang Kwor*

Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927). The respondent here had established a private relationship with the appellant when they mutually signed a contract of supply. This relationship thus was commerce-based, with the appellant as the consumer, and the respondent the energy supplier company. The respondent would expect the appellant to keep its part of the bargain by not tampering with the electricity meter that would cause losses to it.

[21] The Court of Appeal likewise was right in concluding that the facts came within a commercial or contractual environment. We are in total agreement with the factual finding of the Court of Appeal.

[22] Factually we also hold the view that the letter and the two documents were sent out due to the wrongful tampering of the electricity meter on account of a breach of private law. In *Queen v. Minister of Energy and Director General of Electricity Supply ex parte Robert Guildford* [1998] EWHC Admin 203) the court had occasion to opine as regards the involvement of private law, thus:

> The guidance given by the 2nd Respondent to electricity suppliers in this context is in my judgment entirely within the meaning properly to be given, in particular, to schedule 7 paragraph 11 of the Electricity Act 1989. Accordingly the primary declaration sought by the Applicant must be refused.
>
> As to the standard of proof, I see no reason to dissent from the test accepted by the Court in the case of Smith and propounded by the Northern Ireland Courts in the case of Sherlock. **Tampering with an electricity meter falls to be treated as a breach of private law,** as well as a criminal offence (emphasis added).

[23] This appeal is unlike the case of *Tenaga Nasional Bhd v. Ong See Teong & Anor* [2010] 2 CLJ 1, where TNB in exercise of its responsibility to the public pursuant to s. 13 of the Act, was freed of private law when it could enter any land to undertake whatever was necessary for the purpose of maintaining, repairing or upgrading any licensed installation or any part thereof. And without any relationship existing between TNB and the land owners at that. TNB could fell, remove vegetation and do all other things necessary to fulfill the above purpose as it was carrying out a public function under the Act.

[24] Perusing the appellant's submission we failed to find any complaints on the procedural exercise undertaken by the respondent which led to the issuance of the documents (*Chief Constable of North Wales Police v. Evans* [1982] 3 All ER 141). In its submission the appellant ventilated that by the respondent's decision:

> it had clearly made a **decision** capable of affecting the appellant in the following aspects. First by making a **finding** that there is tampering and offences committed pursuant to the ESA. Secondly by **deciding** and coming to the conclusion to exercise the power to disconnect the electricity supply. Thirdly, by **computing** the amounts alleged to be undercharged in arriving at the purported sum. (emphasis added)

[25] Let us now scrutinise the letter. Even though the effect of the letter is quite harsh, s. 38 of the Act empowers the respondent to discontinue the supply of electricity based on the subjective finding of its employee if any offence has been found committed under ss. 37(1), 37(3) or 37 (14). Despite holding the status of being the only supplier of electricity in the country the respondent has clearly complied with all the necessary statutory requirements. It served the appellant not only with the letter of 22 January 2010 but also the two documents, documentations which are necessary prerequisites under the Act. In the event the respondent was later found to have breached its obligation under the contract or its statutory obligation, the appellant may take up action against the respondent. Hence, the appellant is not without a remedy.

Conclusion

[26] Even though satisfied that the appellant has successfully established the issue of *locus standi* and factor of time, it failed to establish that the impugned matter falls under public law realm. In fact we are satisfied that the matter falls squarely under private law. In conclusion, despite the earlier error committed by the respondent when it disconnected the electricity supply for eight hours, we are convinced that the basis of the appellant's appeal is outside the ambit of judicial review. We are satisfied that an arguable case will not be disclosed and the orders sought for

granted at the High Court if leave was given (*Mohamed Nordin bin Johan v. Attorney General Malaysia (supra); Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Berhad & Ors* [2006] 1 CLJ 927).

[27] We therefore conclude that the question for determination must be answered in the negative and therefore dismiss the appeal with costs. The order of the High Court is affirmed.